UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOLARCITY CORP.

and

RAVI WHITWORTH, an Individual Case: 32–CA–180523

Judith J. Chang, Esq.
for the General Counsel.
Gordon A. Letter, Esq.,
Richard H. Rahm, Esq.,
Lisa Linn Garcia, Esq.,
Littler Mendelson, PC,
for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts I approved on June 14, 2017. Charging Party Ravi Whitworth filed the charge on July 20, 2016, and the General Counsel issued the complaint on November 29, 2016. Solarcity Corp. (the Respondent) filed an answer on December 13, 2016, denying all material allegations.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining arbitration agreements that interfere with employees' Section 7 rights to engage in collective legal activity, and interfere with employees' access to the National Labor Relations Board (NLRB or Board) and its processes. It further alleges that the Respondent has enforced an arbitration agreement to interfere with the Charging Party's class, collective, and representative lawsuit.

On February 17, 2017, the Respondent signed a Stipulation and Waiver in which it agreed to waive defenses to piecemeal litigation it may have if the General Counsel withdrew certain complaint allegations, and placed them in abeyance pending the outcome of *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic System Corp*., 823 F.3d 1147 (7th Cir. 2016), and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), pending before the Supreme Court at the time of this decision. The General Counsel accordingly withdrew and placed in abeyance the allegations regarding whether maintenance of the arbitration agreements interfered with employees' Section 7 rights to engage in collective legal action, and whether the Respondent enforced one of the agreements in a manner that interfered with the Charging Party's Section 7 activity of filing a class action, collective action, and representative action lawsuit in

Federal District Court. As such, the issue addressed in this decision is whether the arbitration agreements interfere with employees' access to the Board and its processes.

On the entire record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation with an office and place of business in San Mateo, California, is a solar energy service provider. During the relevant time period, the Respondent purchased and received at its San Mateo, California facility goods valued in excess of $50,000 directly from points located outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times between January 21, 2016 and September 21, 2016, the Respondent required newly hired employees in the State of California to sign as a condition of employment an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" ("California Arbitration Agreement"), which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 18; Jt. Exh. 8.[1])

At all times between January 21, 2016 and May 15, 2016, the Respondent required its newly hired employees working in the United States other than in the State of California to sign as a condition of employment an arbitration agreement that is substantially similar to the Arbitration Agreement ("Non-California Arbitration Agreement"), which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 19; Jt. Exh. 9.) The Non-California Agreement was revised in May 2016 ("Revised Non-California Arbitration Agreement). From approximately May 16, 2016 to September 21, 2016, the Respondent required its newly hired employees working in the United States other than in the State of California to sign the Revised Non-California Agreement as a condition of employment, which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 20; Jt. Exh. 10.)

On or about September 22, 2016, the Respondent implemented a new Arbitration Agreement ("September 2016 Arbitration Agreement"). Since that time, the Respondent has required all newly hired employees throughout the United States, including California, to sign as a condition of employment the September 2016 Arbitration Agreement, which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 21; Jt. Exh. 11.)

[1] Jt. Exh." stands for "joint exhibit" and Stip. stands for "stipulation of facts." Although I have included some citations to the record , I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

All of the arbitration agreements at issue contain the following language, or substantially similar language, in the section entitled "Scope of Agreement":

> Arbitration
>
> . . .
>
> A. Scope of Arbitration Agreement
>
> (1) Disputes which the Company and I agree to arbitrate include, without limitation, any disputes arising out of or relating to interpretation or application of this Agreement, disputes regarding my employment with the Company or its affiliates (or termination thereof), trade secrets, unfair competition, compensation, meal and rest periods, discrimination, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, and all other statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration. . . .
>
> (2) By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class or collective action, except to the extent such waiver is expressly prohibited by law. . . . I understand and acknowledge that this Agreement affects my ability to participate in class or collective actions.
>
> . . .
>
> (5) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver and Representative Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, the Company agrees not to retaliate against, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing or participation in a class, collective or representative action in any forum. If I believe that anyone at the Company has retaliated against me for exercising my rights hereunder, I agree to immediately report this to the Company's Human Resources Department.
>
> . . .
>
> (6) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Moreover, to the extent consistent with application of the Federal Arbitration Act, this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute (including, by way of example, claims that may not be arbitrated under the Dodd-Frank Wall Street Reform and Consumer

Protection Act (Public Law 111-203), or under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX")); claims for workers' compensation benefits, unemployment insurance, or state or federal disability insurance; or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, the Federal Arbitration Act permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the U.S. Securities and Exchange Commission, the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board. I similarly understand and agree that nothing in this Agreement shall prohibit or restrict me from initiating communications with, cooperating with, providing relevant information or testimony to, or otherwise assisting in an investigation conducted by one of the foregoing government agencies in relation to a possible violation of any applicable law, rule or regulation. . . . .

III. DECISION AND ANALYSIS

The arbitration agreements were imposed on all employees as a condition of hiring or continued employment by Solarcity, and are therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647. The issue in the instant case is whether employees would reasonably construe the arbitration agreements to prohibit activity protected by Section 7.

In evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd* 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

The first sentence regarding the scope of the agreement, at Section A(1), begins with: "Disputes which the Company and I agree to arbitrate include, *without limitation* . . . disputes regarding my employment with the Company or its affiliates (or termination thereof) . . . ."

(emphasis supplied). The wording of this provision is clear – all employment disputes, without limitation, must be arbitrated. Clearly, disputes that would fall within the Board's purview are encompassed by this introductory phrase.

The first sentence continues to list certain disputes that, without limitation, must be arbitrated, including disputes about "compensation, meal and rest periods, discrimination, harassment" and "claims arising under the . . . "Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, and all other statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims)." Again, certain disputes that would fall within the Board's purview, such as a collective complaint about compensation or a collective complaint about discrimination for engaging in activity protected by Section 7, are clearly encompassed by the language of this section.[2]

Considering that ambiguities must be construed against the Respondent as the arbitration agreements' drafter, I resolve the conflict between the language requiring arbitration of all employment disputes "without limitation" and the carve-out provisions detailed above and analyzed below, in the Charging Party's favor. Why would employees think the term "without limitation" means anything other than its plain and simple definition? There is simply no reason for the "without limitation" qualifier language attributed to disputes about employment to be included in the agreements if not to confuse the reader. Notably, the phrase "without limitation" is the only qualifier that does not presuppose legal knowledge by the reader. Any exclusions to the agreements' applicability are phrased in terms of when other laws require such exclusions. I find a reasonable employee would read the arbitration agreements to require all employment disputes to be arbitrated without limitation, and I therefore find the agreements violate the Act as alleged.

Though I find the all-encompassing language in the first paragraph ends the analysis, I will continue to review other parts of the agreements in the event a reviewing authority does not agree with me.

The second sentence in the scope of agreement section states, "Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration." While this sentence provides a limited exception to bring claims before an administrative agency, it is phrased in terms of exhaustion of administrative remedies prior to making a claim for arbitration. The procedural mechanisms for bringing cases before the Board do not contemplate exhausting the Board's procedures as a means to the end of arbitrating a claim. I therefore find that this provision does nothing to save the agreements from infringing on employees' rights to engage in Section 7 activity.

[2] The only exclusions in this section are workers compensation, state disability, and unemployment insurance claims.

The next paragraph, at Section A(2), requires employees to waive the right to participate in class or collective action "except to the extent such waiver is expressly prohibited by law." A reasonable employee reading this in the context of the rest of the document is not going to know that the phrase "to the fullest extent permitted by law" excuses disputes resulting in NLRB charges from mandatory binding arbitration. See *2 Sisters Food Group, Inc*. 357 NLRB 1816, 1822 (2011); *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 7 (2015).

Finally, the last section concerning the scope of the agreements, Section A(6), permits employees to file charges with the Board "to the extent consistent with application of the Federal Arbitration Act." The limiting language permits such a charge "only if, and to the extent, the Federal Arbitration Act permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement." Again, without specific legal knowledge of a highly complex and clearly disputed area of law, employees are not going to be able to meaningfully interpret this provision. Moreover, the flawed carve-out provision is reasonably read, within the context of the agreement as a whole, to preclude Board charges seeking group or collective action and relief. *Solarcity*, supra.

Interestingly, this section also permits, with the same qualifier, charges or complaints with the U.S. Equal Employment Opportunity Commission, the federal agency charged with enforcing the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Non-Discrimination Act, among other laws. Yet all of these laws are specifically enumerated in the first section as being subject to the arbitration agreements "without limitation". The only way to reconcile these two provisions is to read the agreements as permitting the filing of a charge with an administrative agency, but ultimately requiring those disputes to be resolved only through final and binding arbitration under the agreements rather than through whatever fruits filing a charge or other similar effort may bear. The same rationale holds true for Board proceedings, given that the agreements require individual arbitration of disputes over employment disputes, including those involving wages and meal/break periods. This begs the question: Why would any employee bother to file a charge? A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the agreements would be subject to individual arbitration, regardless of where or how a charge was originally filed.

The Respondent has raised a timeliness defense under Section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is undisputed the Respondent continued to maintain and enforce the agreements within 6 months of the July 20, 2016 charge. See *PJ Cheese, Inc*., 362 NLRB No. 177, slip op. at 1 (2015). Accordingly, any statute of limitations argument fails.

Based on the foregoing, I find the General Counsel has met his burden to prove the arbitration agreements at issue violate the Act because employees would reasonably conclude the agreements prohibit or restrict their right to file unfair labor practice charges with the Board, including charges that seek to raise group or collective concerns.

IV. CONCLUSIONS OF LAW

(1) Respondent Solarcity Corp., is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondents violated Section 8(a)(1) by interfering with employees' access to the Board and its processes by maintaining language in four arbitration agreements which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board, including charges that seek to raise group or collective concerns.

(3) The complaint is not barred by Section 10(b) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the arbitration agreements are unlawful, the recommended order requires that the Respondent revise or rescind them in all of its forms to make clear to employees that the arbitration agreements do not restrict employees' right to file charges and pursue claims, including group or collective claims, with the National Labor Relations Board. The Respondent shall notify all current and former employees who were required to sign the arbitration agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised agreement(s). I will recommend that the Respondent post a notice in all locations where the Arbitration Agreement and Revised Arbitration Agreement were utilized. *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006); see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (DC Cir. 2007).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Solarcity Corporation, San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration program that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board, including charges that seek to raise group or collective concerns.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its San Mateo facility and at all other facilities where the unlawful arbitration agreements have been maintained, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2017

Eleanor Laws]
Administrative Law Judge

4 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board, including charges that seek to raise group or collective concerns, or to access the Board's processes.

WE WILL rescind the arbitration agreement in all of its forms on a nationwide basis to make clear to employees that the arbitration agreement does not prohibit or restrict employees' right to file charges with the Board, including charges that seek to raise group or collective concerns.

WE WILL notify all applicants and current and former employees who were required to sign the arbitration agreements in any form and at any location that the arbitration agreement has been rescinded or revised, and if revised, provide them with a copy of the revised agreement.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

SOLARCITY CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Oakland Federal Bldg, 1301 Clay Street, Room 300-N, Oakland, CA 94612-5224
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-180523 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 671-3034.